

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of ARLENE R. MAGILL and DEPARTMENT OF THE TREASURY,
INTERNAL REVENUE SERVICE, Philadelphia, PA

*Docket No. 99-2285; Submitted on the Record;
Issued November 17, 2000*

DECISION and ORDER

Before WILLIE T.C. THOMAS, A. PETER KANJORSKI,
PRISCILLA ANNE SCHWAB

The issue is whether appellant has more than a 15 percent permanent impairment of her right hand for which she received a schedule award.

On September 20, 1994 appellant, then a 40 year-old computer operator, filed a claim for traumatic injury (Form CA-1) alleging that she previously had filed a claim on July 5, 1989 for a June 26, 1989 injury sustained when a 50-pound roll of paper rolled on her hand and wrist.

On November 9, 1994 the Office of Workers' Compensation Programs stated that it had accepted appellant's claim for right hand strain and on March 2, 1995 it expanded her accepted injury to include subluxation of the carpal-metacarpal joint and her arthroplasty performed that year.

In a medical report dated May 9, 1995, Dr. Noubar A. Didizian, a Board-certified orthopedic surgeon, stated that appellant had been under his care since August 23, 1994, that she underwent right thumb surgery on September 12, 1994, that she had been out of work since that time and that she had been totally disabled until November 21, 1994.

In a medical report dated October 24, 1995, Dr. David Weiss, appellant's treating osteopath, stated that appellant's date of maximum medical improvement was October 23, 1995 and that she had a 33 percent permanent impairment of her right upper extremity.

On November 16, 1995 appellant, through counsel, filed a request for a schedule award.

On January 17, 1997 the Office medical adviser reviewed the October 24, 1995 medical report of Dr. Weiss and recommended a referral to a second opinion physician for a grip strength determination. The Office medical adviser noted:

"Appellant is entitled to at least an 11 percent impairment of the arm based on a resection arthroscopy (Table 27, page 61, A.M.A., [American Medical Association] *Guides [to the Evaluation of Permanent Impairment]* ([fourth] edition), a figure which Dr. Weiss did not use.

“Grip strength is a consideration to be used rarely according to the A.M.A., *Guides* if no other impairment is present. In this claim, other impairment is present and a grip of [four] kilograms (on the right) is extremely weak.”

On April 10, 1997 the Office referred appellant to Dr. Todd Marc Kelman, an osteopathic physician, for a second opinion evaluation.

In a medical report dated April 30, 1997, Dr. Kelman stated that calculated, according to the A.M.A., *Guides*, a 30 percent impairment of the thumb, based on resection arthroplasty of the carpometacarpal (CMC) joint, combined with 5 percent loss of motion for radial abduction of the thumb. Using the Combined Values Chart, Dr. Kelman found a 32 percent impairment of the right thumb. Stating that the thumb represents 40 percent of the hand’s function, he concluded that appellant had a 13 percent impairment of the right hand, which led to a 12 percent impairment of the right upper extremity.

In a medical report dated July 14, 1997, the Office medical adviser rated appellant with a 15 percent impairment of the right hand.

On August 25, 1997 the Office issued a schedule award for a 15 percent permanent loss of use of the right hand. The Office noted that appellant would receive 36.60 weeks of compensation at the three quarters rate, based on a pay rate of \$558.20 per week, resulting in compensation of \$418.65 per week. The Office further noted that the period of award was from April 30 to August 16, 1997.

On September 3, 1997 appellant requested an oral hearing.

A hearing was held on February 22 and 23, 1998, and on April 10, 1998 the hearing representative remanded the case for clarification of the Office medical adviser’s impairment rating. The hearing representative found that the Office medical adviser had reviewed two different medical reports and had provided ratings for a right arm impairment and a right hand impairment. The hearing representative included additional questions on whether any other impairments to the right upper extremity existed and whether a right upper extremity impairment should be used in lieu of a right hand impairment.

On May 13, 1998 the Office referred appellant to Dr. Howard S. Caplan, a Board-certified plastic surgeon, for a determination regarding the cause and extent of her work-related impairment. The Office noted that there was a conflict in medical opinion regarding the level of impairment in appellant’s case.

In a medical report dated June 25, 1998, Dr. Caplan determined that appellant had a 12 percent permanent impairment of the right hand.

In a medical report dated August 6, 1998, the Office medical adviser reviewed Dr. Caplan’s report and determined that appellant had an 11 percent permanent impairment of the right hand.

In a decision dated August 17, 1998, the Office denied appellant’s claim for a schedule award of more than 15 percent on the grounds that the medical evidence failed to establish any greater impairment.

The Board finds that appellant is entitled to no more than a 15 percent permanent impairment of her right hand for which she received a schedule award.

The schedule award provision of the Federal Employees' Compensation Act¹ provides for compensation to employees sustaining permanent impairment from loss or loss of use of specified members of the body. The Act's compensation schedule specifies the number of weeks of compensation to be paid for the permanent loss of use of specified members, functions and organs of the body. The Act does not, however, specify the manner by which the percentage loss of a member, function or organ shall be determined. The method used in making such a determination is a matter that rests in the sound discretion of the Office.² For consistent results and to ensure equal justice under the law to all claimants, good administrative practice necessitates the use of a single set of tables so that there may be uniform standards applicable to all claimants.³

Section 8123(a) of the Act⁴ provides that where there is disagreement between the physician making the examination for the United States and the physician of the employee, the Office shall appoint a third physician who shall make an examination. In situations where there are opposing medical reports of virtually equal weight and rationale, and the case is referred to an impartial medical specialist for the purpose of resolving the conflict, the opinion of such specialist, if sufficiently well rationalized and based on a proper factual background, must be given special weight.⁵

In this case, the hearing representative instructed the Office to refer the case file to the Office medical adviser for clarification regarding the impairment ratings and also for additional information regarding whether any other impairments to the right upper extremity existed, and whether a right upper extremity impairment should be used in lieu of a right hand impairment.

In response, the Office referred the case file to Dr. Caplan, a Board-certified plastic surgeon, who determined that appellant had a 12 percent permanent impairment of the right hand. Dr. Caplan provided the following findings for loss of use of the right hand:

“Normal range of motion through wrists and fingers. There is pain over the radial forearm on the right side and a positive Finkelstein test with an equivocal Grind test at the basilar joint of the right thumb. Range of motion of the carpal-metacarpal joint, right, is 5 by 5 degrees; metacarpophalangeal joint -35 degrees by 45 degrees, and interphalangeal joint are -5 degrees by 85 degrees. She abducts to 30 degrees and adduction across the palm allows her to touch the base of the small finger. Opposition to the third metacarpal level measures three centimeters.

¹ 5 U.S.C. § 8107.

² *Arthur E. Anderson*, 43 ECAB 691, 697 (1992); *Danniel C. Goings*, 37 ECAB 781, 783 (1986).

³ *Henry L. King*, 25 ECAB 39, 44 (1973).

⁴ 5 U.S.C. § 8123.

⁵ *Nancy Lackner Elkins*, 44 ECAB 840, 846-47 (1993).

“Key pinch right and left in kilograms is 6 by 15 kilograms and tip punch is 2 by 6 kilograms. There is some minor degree of decreased sensation over the superficial branch of the radial nerve distribution to the dorsum of the right thumb which has no functional significance.

“Utilizing the A.M.A., *Guides* (4th ed. 1993) one could write her permanent partial disability. The reading is as follows: metacarpophalangeal joint 3 percent (Figure 13); interphalangeal joint 1 percent (Figure 10); carpal-metacarpal joint abduction 3 percent (Table 6); adduction normal; opposition 9 percent (Table 7); strength 20 percent (Table 34). Utilizing the A.M.A., *Guides*, this would give her a 29 percent disability involving the dominant right thumb which would equate to a 12 percent permanent impairment of the hand.”

The report of Dr. Caplan, the impartial medical specialist selected by the Office to resolve a conflict of medical opinion, is sufficiently well rationalized and based on a proper factual background. As such, it is given special weight and constitutes the weight of medical opinion evidence.⁶ The report of Dr. Caplan establishes that appellant did not have greater than a 15 percent permanent impairment of her right hand and therefore is not entitled to a greater award.

Accordingly, the August 17, 1998 decision of the Office of Workers’ Compensation Programs is hereby affirmed.

Dated, Washington, DC
November 17, 2000

Willie T.C. Thomas
Member

A. Peter Kanjorski
Alternate Member

Priscilla Anne Schwab
Alternate Member

⁶ See *James P. Roberts*, 31 ECAB 1010 (1980).